PP v. WAN MOHAMAD NUR FIRDAUS ABD WAHAB & ANOTHER APPEAL

COURT OF APPEAL, PUTRAJAYA
MOHTARUDIN BAKI JCA
HARMINDAR SINGH DHALIWAL JCA
RHODZARIAH BUJANG JCA
[CRIMINAL APPEALS NO: W-05(H)-340-08-2017 &
W-05(H)-367-08-2017]
18 SEPTEMBER 2018

CRIMINAL PROCEDURE: *Sentence – Appeal against sentence – Terrorism related offences – Pledging of oath of allegiance to terrorist group – Mitigating factors – Accused pleaded guilty – Whether plea allowed for discount on sentence – Whether accused first offender – Whether accused's participation in terrorist group passive and minimal – Whether there was justification for imposing heavy sentence – Whether court ought to reduce sentence – Penal Code, ss. 130J(1)(a), 130JB(1)(a)*

CRIMINAL LAW: *Penal Code – Section 130J(1)(a), 130JB(1)(a) – Terrorism related offences – Pledging of oath of allegiance to terrorist group – Appeal against sentence – Mitigating factors – Accused pleaded guilty – Whether plea allowed for discount on sentence – Whether accused first offender – Whether accused's participation in terrorist group passive and minimal – Whether there was justification for imposing heavy sentence – Whether court ought to reduce sentence – Penal Code, ss. 130J(1)(a), 130JB(1)(a)*

The crime committed by the accused was discovered when, pursuant to his arrest by the police, the accused's handphone was seized. From an analysis of the said handphone by the police, 23 images or photographs connected to the terrorist group, Islamic State ('IS'), were discovered. Further investigations by the police revealed the accused had, *vide* a social media platform Telegram 'Gagak Hitam', under the name Lat Firdaus, swore an oath of allegiance to IS. Accordingly, the accused was charged with two offences under ss. 130J(1)(a) and 130JB(1)(a) of the Penal Code. The High Court, in finding the accused guilty of the charges against him, sentenced the accused to eight years and five years' imprisonment respectively. Both the accused and the Public Prosecutor ('PP') were dissatisfied with the said sentences and each filed an appeal against the same. In his mitigation, the accused submitted that (i) he had pleaded guilty to both charges at the very instance when he was arraigned before the High Court; (ii) he was only 22 years old; (iii) his family background showed that he had three school going siblings, aged parents and a mother suffering from hypertension; and (iv) the accused was influenced to commit the offences by friends and the social media. The Deputy Public Prosecutor ('DPP'), on the other hand, urged for a deterrent sentence because of the seriousness of the offence and for public interest.

Held (allowing accused's appeal; dismissing Public Prosecutor's appeal) Per Rhodzariah Bujang JCA delivering the judgment of the court:

(1) The accused had pleaded guilty to the charge and it is trite law that such a plea allowed the court to give a discount on the sentence. Although these offences were serious in nature, nonetheless, they should not be treated on equal footing for some acts of terrorism were more heinous than others. The accused's participation in IS must be a factor to be weighed by the court and his was just a passive and not an active one. The degree of participation by the accused with the said terrorist group was passive and indeed minimal. He did nothing more than swear an allegiance to it and as for the impugned images in his handphone, these were downloaded from the internet through Telegram application and the accused never did anything more than keep them there – he did not forward them to anyone else. (paras 6-8)

(2) Given the age of the accused, this court could not discount the probability that the accused was unduely influenced into joining the chat group 'Gagak Hitam', a hipster culture popular with the young. It was not disputed that the accused was a young first offender, who had pleaded guilty to the charge at the first opportunity and had done nothing more than keep the said images in his handphone. In other words, there was simply no justification for imposing such a heavy sentence, almost the maximum, on the accused. Thus, this court reduced the sentence of the first charge to five years' imprisonment and of the second charge to two years' imprisonment, with both sentences to run concurrently from the date of his arrest. (paras 8-10)

Bahasa Malaysia *Headnotes*

Tertuduh didapati melakukan jenayah apabila, berikutan tangkapannya oleh pihak polis, telefon bimbit tertuduh dirampas. Berdasarkan analisis telefon bimbit tersebut oleh pihak polis, 23 imej atau gambar-gambar berkaitan kumpulan pengganas, Islamic State ('IS'), telah ditemui. Siasatan selanjutnya oleh pihak polis menunjukkan bahawa tertuduh telah, melalui platform media sosial Telegram 'Gagak Hitam', bawah nama Lat Firdaus, berikrar satu sumpah taat setia kepada IS. Berikutan itu, tertuduh dituduh dengan dua kesalahan bawah ss. 130J(1)(a) dan 130JB(1)(a) Kanun Keseksaan. Mahkamah Tinggi, dalam mendapati tertuduh bersalah atas pertuduhan-pertuduhan terhadapnya, menjatuhkan hukuman penjara lapan tahun dan lima tahun atas tertuduh. Kedua-dua tertuduh dan Pendakwa Raya ('PR') tidak berpuas hati dengan kedua-dua hukuman itu dan masing-masing memfailkan rayuan terhadap yang sama. Dalam mitigasinya, tertuduh berhujah bahawa (i) dia telah mengaku salah terhadap kedua-dua pertuduhan sebaik sahaja dia dihadapkan dengan pertuduhan-pertuduhan itu di Mahkamah Tinggi; (ii) dia hanya 22 tahun; (iii) latar belakang keluarganya menunjukkan bahawa dia mempunyai tiga adik beradik yang masih

bersekolah, ibu bapa yang sudah berumur dan ibunya yang menghidap tekanan darah tinggi; dan (iv) tertuduh telah dipengaruhi untuk melakukan kesalahan-kesalahan tersebut oleh kawan-kawannya dan media sosial. Timbalan Pendakwa Raya ('TPP'), walau bagaimanapun, menyeru satu hukuman pencegahan dijatuhkan disebabkan keseriusan kesalahan serta kepentingan awam.

Diputuskan (membenarkan rayuan tertuduh; menolak rayuan Pendakwa Raya)

Oleh Rhodzariah Bujang HMR menyampaikan penghakiman mahkamah:

(1) Tertuduh telah mengaku salah terhadap pertuduhan dan adalah undang-undang matan bahawa pengakuan tersebut membenarkan mahkamah mengurangkan hukuman. Walaupun kesalahan-kesalahan ini bersifat serius, namun begitu, ia tidak patut dianggap sebagai kedudukan seimbang dengan tindakan-tindakan pengganas yang lebih kejam. Penyertaan tertuduh dalam IS adalah faktor yang perlu dipertimbangkan oleh mahkamah dan penyertaannya hanyalah pasif dan tidak aktif. Darjah penyertaan tertuduh dengan kumpulan pengganas tersebut adalah pasif dan minimum. Dia hanya berikrar sumpah setia kepadanya dan berkenaan imej-imej dalam telefon bimbitnya, ini dimuat turun daripada internet melalui aplikasi Telegram dan tertuduh tidak berbuat apa-apa dengannya dan hanya menyimpannya – dia tidak menghantarnya kepada sesiapa.

(2) Memandangkan umur tertuduh, mahkamah ini tidak mengetepikan kebarangkalian bahawa tertuduh dipengaruhi untuk menyertai kumpulan sembang 'Gagak Hitam', satu budaya hipster yang popular dengan golongan remaja. Tidak dipertikaikan juga tertuduh adalah pesalah pertama yang muda, yang telah mengaku salah terhadap pertuduhan sebaik sahaja ada peluang dan hanya menyimpan imej-imej itu dalam telefon bimbitnya. Dengan erti kata lain, tiada justifikasi untuk mengenakan hukuman yang berat, hampir yang maksimum, ke atas tertuduh. Oleh itu, mahkamah mengurangkan hukuman pertuduhan pertama kepada lima tahun penjara dan pertuduhan kedua kepada dua tahun penjara, dan kedua-dua hukuman untuk berjalan secara serentak daripada tarikh tangkap.

Case(s) referred to:

Mohd Abdullah Ang Swee Kang v. PP [1987] 2 CLJ 405; [1997] CLJ (Rep) 209 ***(refd)***
PP v. Aszroy Achoi [2018] 8 CLJ 762 HC ***(refd)***
PP v. Bukhori Che Noor (45S0-40-03-2017) (Unreported) ***(refd)***
PP v. Imam Wahyudin Karjono & Satu Lagi [2017] 1 LNS 691 HC ***(refd)***
PP lwn. Ummi Kalsom Bahak [2015] 1 LNS 1493 CA ***(refd)***
Sau Soo Kim v. PP [1975] 1 LNS 158 FC ***(refd)***

Legislation referred to:

Penal Code, ss. 130J(1)(a), 130JB(1)(a)

A *(Criminal Appeal No: W-05(H)-340-08-2017)*
For the appellant - Wan Shaharuddin Wan Ladin; DPP
For the respondent - Mohd Faizi Che Abu & Muhd Daniel Baharudin; M/s Yusfarizal, Aziz & Zaid

(Criminal Appeal No: W-05(H)-367-08-2017)
B *For the appellant - Mohd Faizi Che Abu & Muhd Daniel Baharudin; M/s Yusfarizal, Aziz & Zaid*
For the respondent - Wan Shaharuddin Wan Ladin; DPP

[Editor's note: For the High Court judgment, please see PP lwn. Wan Mohamad Nur Firdaus Abd Wahab [2017] 1 LNS 1786 (overruled in part).]

C *Reported by Suhainah Wahiduddin*

JUDGMENT

Rhodzariah Bujang JCA:

D **Introduction**

[1] These two appeals originate from a decision of the High Court in sentencing the accused to eight years and five years' imprisonment respectively, for two charges under s. 130J(1)(a) and s. 130JB(1)(a) of the Penal Code. Both the accused and the Public Prosecutor ("the PP") were
E dissatisfied with the said sentences and have each filed an appeal against the same. Having heard their submissions at the joint hearing of the two appeals, we have allowed the appeal of the accused and dismissed that of the Public Prosecutor. Our reasons for doing so are enumerated below but first, we would reproduce the two charges as contained at pp. 9 and 11 of the appeal
F record vol. 1:

1st charge

Bahawa kamu di antara 25 Mac 2016 hingga 25 September 2016, di sebuah rumah beralamat No. 8, Jalan Cili 24/28D, Seksyen 24, di dalam Daerah Petaling, di dalam Negeri Selangor Darul Ehsan, dengan pengetahuan
G telah memberi sokongan kepada kumpulan pengganas iaitu Islamic State dengan cara menggunakan aplikasi media social Telegram atas nama Lat Firdaus, dan dengan itu kamu telah melakukan suatu kesalahan di bawah seksyen 130J(1)(a) Kanun Keseksaan yang boleh dihukum di bawah seksyen 130J(1) Kanun yang sama.

H Hukuman

Jika disabitkan dengan kesalahan, kamu hendaklah diseksa dengan penjara seumur hidup atau penjara selama tempoh tidak melebihi tiga puluh tahun, atau denda dan bolehlah dirampas mana-mana harta yang telah digunakan atau diniat untuk melakukan kesalahan itu.

I 2nd charge

Bahawa kamu pada 25 September 2016 jam lebih kurang 8.35 pagi, di sebuah rumah beralamat No 8, Jalan Cili 24/28D, Seksyen 24, dalam Daerah Petaling, dalam Negeri Selangor Darul Ehsan, telah memiliki

23 keping imej di dalam telefon bimbit jenama Oppo model R8006 berwarna hitam (Nombor IMEI:356121042654354) yang mempunyai kaitan dengan kumpulan pengganas Islamic State (IS) dan dengan itu kamu telah melakukan satu kesalahan di bawah perenggan 130JB(1)(a) Kanun Keseksaan (Akta 574) dan boleh dihukum di bawah peruntukan yang sama.

Hukuman

Jika disabitkan dengan kesalahan, kamu hendaklah dihukum dengan penjara untuk tempoh tidak melebihi tujuh (7) tahun atau denda dan boleh dilucut hak mana-mana item tersebut.

The Brief Facts

[2] In summary, the crime committed by the accused was discovered when pursuant to his arrest by the police on 25 September 2016 at 8.35am, his handphone was seized. From an analysis of the said handphone by the police, 23 images or photographs connected to the terrorist group, Islamic State (IS) were discovered. Further investigation by the police revealed the accused had on 30 March 2016 at 7.32am *vide* a social media chat platform Telegram "Gagak Hitam", under the name "Lat Firdaus" swore an oath of allegiance to IS as follows:

Saya Firdaus Bersumpah Demi Allah Tidak Akan Berkhianat Kepada Ikhwah Anshar Daulah Islamiyah Dimanapun Berada, Siap Menerima Azab Dari Allah, & Tidak Di Terima Bumi Bila Saya Berkhianat & Saya Memberikan Informasi Penting Kepada Thaghut Berupa Identitas, Strategi, Maupun Pergerakan Yang Sekecil-kecilnya Dari Perjuangan Ini Atau Apapun Yang Dapat Membahayakan Keselamatan Anshar Daulah Lainnya. Bila Saya Tertangkap Atau Terancam Dibunuh, Saya Tidak Akan Memberikan Informasi Apapun Kepada Musuh-musuh Allah.

Inilah Sumpah Saya Atas Nama Allah Swt, Semoga Allah Melindungi Saya Lahir & Batin, Dunia & Akhirat Aaamiin Ya Rabbal Alamin ... .

[3] According to Ahmad El-Muhammady bin Muhammad Uthman El-Muhammady from Pusat Pengajian Asasi of International Islamic University who was asked to analyse the said allegiance, the oath signifies these:

Bay'ah merupakan sumpah yang dilakukan oleh seseorang untuk memberi kesetiaan dan ketaatan kepada ketua (amir) dan kumpulan. *Bay'ah* merupakan satu upacara penting bagi seorang pengikut untuk menyertai sesuatu kumpulan. Apabila seseorang itu memberikan *bay'ah* atau sumpah taat setia kepada seseorang atau kumpulan, maka implikasinya seperti berikut:

(i) Seseorang menjadi ahli bagi kumpulan itu secara rasmi

(ii) Ahli bersedia memberi kesetiaan (*wala*') yang mutlak kepada ketua atau kumpulan

(iii) Bila diberi arahan oleh ketua atau kumpulan, ahli wajib taat atau wajib patuh pada arahan tanpa ragu-ragu (*al-taáh*)

(iv) Sekiranya ahli tidak akur atau melanggar *bay'ah*, akan gugur keahlian, dianggap durhaka kepada ketua (amir), wajib dihukum. Hukuman ini dilaksanakan oleh kumpulan atau sumpah untuk mendapat hukuman dari Allah di dunia dan akhirat

(v) Sekiranya dia melanggar sumpah (*bay'ah*), dia akan mendapat balasan di dunia dan di akhirat.

Accordingly, the accused was charged with the two offences as stated above.

[4] The accused, who was 22 years old at that material time pleaded guilty to both charges at the very instance when he was arraigned before the High Court to face them but the case was postponed to provide him with the services of a lawyer from the National Legal Aid Foundation. In his mitigation, other than his family background such as three school going siblings, aged parents and a mother suffering from hypertension, his then counsel informed the court that the accused was influenced to commit the offences by friends and the social media. He was remorseful and promised not to commit the like offences in the future. The learned Deputy Public Prosecutor ("DPP") in his written submission of course urged for a deterrent sentence because of the seriousness of the offence and for public interest. The learned High Court Judge was moved to impose a sentence of eight years for the first charge and five years for the second charge with both sentences to run from the date of his arrest, that is 25 September 2016. We were in turn moved to allow the accused's appeal against the sentences passed for the following reasons.

Manifest Sentences

[5] We must state at the outset that it was never our intention, in reducing the sentences passed by the learned High Court Judge, to send a signal to the public or particularly would be offenders of this crime, that terrorism-related offences are not serious crimes. These offences are a scourge to society everywhere and acts of terrorism have caused untold sufferings and the loss of lives worldwide. We therefore have no intention, in arriving at this decision, to trivialise the same. However, although these offences are serious in nature, nonetheless they should not be treated on equal footing for some acts of terrorism are more heinous than the others. This fact is actually acknowledged by the Sentencing Council of United Kingdom when it came up with a definitive guideline to terrorism offences for the different types of offences under its Terrorism Act 2000. In the said guidelines, the offences are categorised by two factors, which are culpability and harm. Then certain characteristics of these two factors such as the role played by the accused must be considered by the court. In detail, the said characteristics are reproduced below:

PROSCRIBED

Culpability demonstrated by one or more of the following:	
A	• Offender in position of trust, authority or influence and abuses their position • Persistent efforts to gain widespread or significant support for organisation • Encourages activities intended to cause endangerment to life
B	• Arranged or played a significant part in the arrangement of a meeting/event aimed at gaining significant support for organisation • Intended to gain widespread or significant support for organisation • Encourages activities intended to cause widespread of serious damage to property, or economic interests or substantial impact upon civic infrastructure
C	• Lesser cases where characteristics for categories A and B are not present

Harm The court should consider the factors set out below to determine the level of harm.	
Category 1	• Evidence that others have acted on or been assisted by the encouragement to carry out activities endangering life • Significant support for the organisation gained or likely to be gained
Category 2	• Evidence that others have acted on or been assisted by the encouragement to carry out activities not endangering life
Category 3	• All other cases

[6] We must say that the above guidelines provide a fair and just consideration for these kind of offences and although not binding upon us, it is still persuasive enough for a determination of this appeal. As submitted by learned counsel for the accused, his participation in IS must be a factor to be weighed by the court and his was just a passive and not an active one.

[7] Another pertinent factor for our consideration is the trend of sentencing for the same offences committed as stated at pp. 3-4 of the written submission of learned counsel for the accused before us and that appearing in the learned Deputy Public Prosecutor's written submission before the High Court (at pp. 8-9 of vol. 4 of the appeal record) which we desist from reproducing in this judgment save to say this.

The case of *PP lwn. Imam Wahyudin Karjono & Satu Lagi* [2017] 1 LNS 691 (Case No 45S0-35-12-2016) for an offence under s. 130J(1)(a) of the Penal Code where the accused was sentenced to ten years was not just for making that same oath of allegiance to IS but he was also charged for throwing and detonating a bomb at a club (MOVIDA) in Puchong, Selangor. Obviously, the accused in this cited case had taken his oath of allegiance to the next extreme level. That of *PP v. Bukhori Che Noor* (45S0-40-03-2017) where the accused was sentenced to seven years imprisonment was for allowing the use of his personal account by IS and in the case of *PP v. Aszroy Achoi* [2018] 8 CLJ 762, the accused used his Facebook account to recruit sympathisers to IS for which he was sentenced to seven years and two years' imprisonment respectively for the same two charges as in this case but this was after a full trial. The accused in this appeal before us, it must be emphasised, pleaded guilty to the charge and it is trite law that such a plea allows the court to give a discount on the sentence (see *Mohamad Abdullah Ang Swee Kang v. PP* [1987] 2 CLJ 405; [1987] CLJ (Rep) 209; [1988] 1 MLJ 167 and *Sau Soo Kim v. PP* [1975] 1 LNS 158; [1975] 2 MLJ 134).

Another case for comparison is *PP lwn. Ummi Kalsom Bahak* [2015] 1 LNS 1493 where the accused was charged under s. 130J(1)(a) of the Penal Code and was sentenced to two years imprisonment on her own plea of guilty. She was caught when leaving the country to join IS in Syria and the decision was affirmed by the Court of Appeal. A further appeal by the Public Prosecutor to the Federal Court was dismissed. In all these aforementioned cases, as rightly submitted by learned counsel for the accused before us, there was indeed active participation in the terrorist group by the said accused persons.

[8] Coming back to the facts of this case, we have to agree with learned counsel for the accused that the degree of participation by the accused with the said terrorist group was passive and indeed minimal. He did nothing more than swore that allegiance to it and as for the impugned images in his handphone, as again rightly submitted by his counsel, these were downloaded from the internet through the Telegram application and the accused never did anything more than keep them there - he did not forward them to anyone else. Given the age of the accused, we also cannot discount the probability that the accused was unduly influenced into joining the chat group 'Gagak Hitam', a hipster culture popular with the young.

[9] Another pertinent factor we noted is the fact that for the second charge the maximum punishment was seven years' imprisonment and what is more, imprisonment is not mandatory. We simply failed to understand and it was not explained by the learned High Court Judge why he had to impose five years' imprisonment on the accused when it was not disputed that he was a young first offender who had pleaded guilty to the charge at the first opportunity and as stated earlier had done nothing more than keep the said images in his handphone. In other words, there was simply no justification for imposing such a heavy sentence, almost the maximum, on the accused.

[10] Thus, for all the foregoing reasons, we have decided to allow the appeal of the accused and dismissed that of the Public Prosecutor by reducing the sentence of the first charge to five years' imprisonment and that of the second charge to two years imprisonment, with both sentences to run concurrently from the date of his arrest.